IN THE SUPREME COURT OF IOWA
Supreme Court No. 15–1543

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CARLOS ARIEL GOMEZ GARCIA,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MUSCATINE COUNTY
THE HON. STUART P. WERLING, JUDGE

APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals Decision: November 9, 2016)

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@iowa.gov

ALAN OSTERGREN
Muscatine County Attorney

KOREE SHIPPEE
Assistant Muscatine County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

QUESTION PRESENTED

(1) The Iowa Court of Appeals found that the defendant should have been allowed to waive his right to an interpreter. When it turned to "the thorny question of the proper remedy," it concluded that reversal "does not require a showing of prejudice because the aim is to protect that free choice, independent of concern for the objective fairness of the proceeding."

Is <u>every</u> defendant who can show that he/she should have been allowed to waive his/her right to an interpreter entitled to automatic reversal of his/her convictions?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Codes

State Rules

STATEMENT SUPPORTING FURTHER REVIEW

On November 9, 2016, the Court of Appeals reversed the defendant's conviction for delivering cocaine. *State v. Gomez Garcia*, No. 15–1543, 2016 WL 6636699 (Iowa Ct. App. Nov. 9, 2016). He had requested and used Spanish-language interpreters at early hearings. He sought to waive that right as his trial date approached, so he could appear without an interpreter at his jury trial. The trial court, out of an abundance of caution, ruled that standby interpretation services would still be provided during the defendant's trial. Subsequently, the defendant waived his right to a jury trial and asked for a bench trial.

After finding the defendant should have been allowed to waive interpretation services, the Court of Appeals applied a *Faretta*-like standard and held that "reversal for a violation of that right [to waive an interpreter] does not require a showing of prejudice because the aim is to protect that free choice, independent of concern for the objective fairness of the proceeding." *See Gomez Garcia*, at *8. Thus, the panel's opinion placed this in the "limited class of fundamental constitutional errors [that] defy analysis by harmless error standards," like the error produced by an improper denial of self-representation. *See State v. Cooley*, 608 N.W.2d 9, 16 (Iowa 2000).

Here, further review is appropriate because the panel's opinion decided "an important question of law that has not been, but should be, settled by the supreme court." *See* Iowa R. App. P. 6.1103(1)(b)(2). This Court has not articulated a standard for determining whether a defendant may waive the right to assistance of an interpreter, nor has it discussed whether/when reversal is required after a waiver request has been improperly denied. This Court should take this opportunity to decide on a standard for Iowa appellate/PCR courts to apply when confronted with similar claims in the future.

Moreover, the panel opinion's use of a *Faretta*-type standard conflicts with this Court's precedent limiting that paradigm to errors "affecting the framework within which the trial proceeds, as opposed to simple errors in the trial process." *Cooley*, 608 N.W.2d at 17; *see also* Iowa R. App. P. 6.1103(1)(b)(3). The panel noted that the error produced by refusing to accept proper waiver of an interpreter was "independent of concern for the objective fairness of the proceeding." *See Gomez Garcia*, at *8. This Court should resolve the conflict by reiterating that a *Faretta*-type standard only applies when assessing an error that "fundamentally affects the process and outcome of a trial." *See Cooley*, 608 N.W.2d at 18.

STATEMENT OF THE CASE

Nature of the Case

The Court of Appeals held (1) the defendant had an implied statutory right to waive the use of all standby interpretation services; and (2) failure to permit waiver required reversal of his conviction without case-specific error analysis. The State seeks further review.

Course of Proceedings

Carlos Ariel Gomez Garcia was charged with delivery of a controlled substance, a Class C felony, in violation of Iowa Code section 124.401(1)(c)(2)(b) (2015). A Spanish interpreter had been provided for him during earlier proceedings. Just before his jury trial was set to begin, he told the trial court that he was fluent in English and did not need an interpreter. The court took a cautious approach; it instructed standby interpreters to provide real-time translation, but it told the defendant that he could remove the wireless earpiece if he no longer desired to use their translation services. The defendant argued that this would prejudice the jury against him. The trial court disagreed, but offered to give a cautionary instruction. Subsequently, the defendant waived his right to a jury trial in an unreported colloquy. *See* Trial Tr. p.3,ln.1–p.19,ln.12. The case proceeded to a bench trial, and the defendant was found guilty as charged.

On appeal, the defendant argued that defense counsel was ineffective for allowing him to waive his right to a jury trial, and he also challenged the trial court's ruling that standby interpreters should continue to provide translation services. The State defended the trial court's risk-averse approach to standby interpreter services and argued that the defendant failed to show he suffered prejudice from either alleged error. *See* State's Br. at 4–11.

The Court of Appeals held that "the availability of waiver hinges not on Gomez Garcia's proficiency in the English language but on the knowing and voluntary nature of his affirmative request to forego interpretation services," and concluded "the district court erred in not honoring Gomez Garcia's request to waive an interpreter." *See Gomez Garcia*, at *5–6. On "the thorny question of the proper remedy," the panel determined this type of claim "defies the normal standard of determining prejudice" because it "reflects Gomez Garcia's individual choice regarding how his defense is conducted, and obtaining reversal for a violation of that right does not require a showing of prejudice because the aim is to protect that free choice, independent of concern for the objective fairness of the proceeding." *Id.* at *7–8. From that, the panel concluded this type of error requires automatic reversal.

Statement of Facts

In January 2015, the defendant's bond review hearing was continued because he "state[d] he needs an interpreter." *See* Order for Continuance FECR052353 (1/23/15); *cf. Gomez Garcia*, at *1. Throughout a number of pretrial hearings, the defendant continued to receive Spanish translation services. *See* Hearing Tr. (4/23/15); *see also Gomez Garcia*, at *1.

Right before his jury trial was scheduled to begin, the defendant asked to proceed without interpretation services. *See* Trial Tr. p.3,ln.1–p.5,ln.11. After a colloquy with the defendant, the trial court said:

> I'm going to, in part, grant the motion. I'm going to grant the motion that the interpreters are not going to be standing next to you and whispering in your ear or sitting next to you and whispering in your ear.
>
> The interpreters tell me that they've got a wireless earpiece that they are going to give to you. You can put the earpiece in if you wish to, or you can take it out if you wish to.
>
> But I am going to order that the interpreters be on standby and that they provide the service. You can elect to use it or not use it during the trial as you see fit.

See Trial Tr. p.5,ln.14–p.11,ln.11. The trial court said that it would "give some reasonable limiting instruction to the jury that they are to make no assumptions based on the fact that an interpreter is present in the courtroom." *See* Trial Tr. p.12,ln.1–p.13,ln.7.

Both parties moved for a continuance so that the defendant could have time to prove that he did not need interpretation services. The trial court stated that a continuance would not help:

> Well, I'm gonna deny the motion to continue. We have a jury ready to go. We're going to do the trial. I think that the remedy is in jury instructions, if necessary, and I will certainly consider that if the Defense requests it.
>
> I think we're doing everything we can to make the interpreters as unobtrusive as possible, but it's the Court's duty to make sure that his right to fair trial is protected. All the Court is doing by this ruling is making interpreters available, not forcing it upon him, because he can take the earpiece out.
>
> [. . .]
>
> . . . I'm basing my ruling on the theory that it is the Court's duty to assure a fair trial. And in this case, I think a fair trial means I must have an interpreter available, at least on a standby basis.
>
> [. . .]
>
> I don't know that any further testing will be of any particular use. . . .
>
> The question is: What level of competency in English is sufficient to proceed without an interpreter? And I'm not aware of a good legal standard that answers that question. Taking a test and giving me a result simply won't be. It's not legal guidance.

Trial Tr. p.13,ln.11–p.17,ln.18. Subsequently, the defendant waived his right to a jury trial in an unreported colloquy. *See* Trial Tr. p.19,ln.8–12. The case proceeded to a bench trial, and the defendant was found guilty as charged. *See* Order and Verdict (7/22/15); App. 7.

ARGUMENT

I. The Iowa Court of Appeals Erred in Determining That Improperly Denying Waiver of Interpretation Services Requires Automatic Reversal With No Error Analysis.

Preservation of Error

In his brief on appeal, the defendant argued that "the use of an interpreter in this case was improper and . . . ultimately prejudiced Defendant by placing Defendant in a position of waiving his right to trial by jury." *See* Appellant's Br. at 14. The State responded to that allegation of prejudice. *See* State's Br. at 9–11. But the parties agreed "prejudice must be shown" to warrant reversal. Appellant's Br. at 10. The Court of Appeals considered that framework and rejected it, which is sufficient to preserve error.

Standard of Review

The panel's decision to apply a *Faretta*-type framework that sidesteps harmless error analysis should be reviewed for legal error.

Merits

The panel opinion imported a remedy with limited applicability: presumed prejudice, requiring automatic reversal. In doing so, it misapprehended the justifications for requiring automatic reversal in other contexts. Here, requiring automatic reversal is inappriopriate, and doing so sets a dangerous precedent.

A. Prejudice is only presumed from serious errors implicating the fundamental fairness of a trial. The panel's logic would presume prejudice and require retrials based on *de minimis* errors.

The panel analogizes the decision to waive interpretation to the decision to waive the right to counsel and pursue self-representation. *See Gomez Garcia*, at *7–8. The panel ultimately concluded that any improper denial of a request to waive interpretation services "defies the normal standard of determining prejudice" because a defendant's decision on whether to accept an interpreter's assistance at trial "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *See id.* at *8 (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975)). In the panel's view, "obtaining reversal for a violation of that right does not require a showing of prejudice because the aim is to protect that free choice, independent of concern for the objective fairness of the proceeding." *See id.*

The right to an interpreter's assistance originates from a statute which contains no indication that it aims to protect "free choice." *See* Iowa Code § 622A.2 (2015); *cf.* Iowa Ct. R. 47.3(1). But even if it did, presuming prejudice for every erroneous ruling at trial that impedes "free choice" would invite claims seeking automatic reversal based on *de minimis* errors with no relationship to validity of any conviction.

That "free choice" standard would replace all harmless error review—for example, every claim that cumulative defense-friendly evidence was improperly excluded would be couched in free-choice language framing the evidentiary ruling as a flagrant denial of the defendant's "individual choice regarding how his defense is conducted" and would seek automatic reversal, regardless of the strength of the State's case. *See Gomez Garcia*, at *8.

This Court has never endorsed that "free choice" standard for determining when automatic reversal should be required. Rather, automatic reversal is required for errors that "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may then be regarded as fundamentally fair." *See State v. Cooley*, 608 N.W.2d 9, 17 (Iowa 2000). The right to waive interpretation services is not one of those rights—especially when the defendant can simply remove the translation earpiece and ask that the jury be admonished to ignore the interpreters' presence. *See, e.g.*, *Frescas v. State*, 636 S.W.2d 516, 518 (Tex. Ct. App. 1982) ("Simple expedients are available on the spot to correct any actual harm which a defendant may be suffering through excessive translation.").

The panel's example of a "free-choice error" which can require automatic reversal is a defendant's right to retain counsel of his choice. *See Gomez Garcia*, at *8 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006)). But denial of that particular "free choice" is only deemed presumptively prejudicial because the entire trial framework may hinge upon the defendant's choice of counsel.

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds,"—or indeed on whether it proceeds at all.

Gonzalez-Lopez, 548 U.S. at 150 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). There is no support for the notion that any/all "free-choice error" requires automatic reversal, independent of its impact on the fundamental fairness of the subsequent proceedings.

For instance, the panel opinion referenced the right to appeal. *See Gomez Garcia*, at *5 (citing *State v. Hinners*, 471 N.W.2d 841, 845 (Iowa 1991)). Whenever defense counsel "fails to file an appeal against the defendant's wishes," Iowa courts presume prejudice—not because

of the lost opportunity to make "voluntary, knowing, and intelligent" decisions relating to trial/appeal, but because *that specific outcome* represents a "serious denial of the entire judicial proceeding itself." *See Lado v. State*, 804 N.W.2d 248, 252 (Iowa 2011) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)). Again, "free-choice error" only requires automatic reversal insofar as it necessarily undermines the fundamental fairness of the ensuing trial proceedings.

Even in *Faretta* cases, "free choice" does not have talismanic importance as a touchstone of automatic reversal. Cases involving appointment/management of standby counsel recognize that "[t]he trial judge may be required to make numerous rulings reconciling the participation of standby counsel with a *pro se* defendant's objection to that participation." *See McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). While total deprivation of the right to self-representation "cannot be harmless," trial court rulings providing guidelines for standby counsel's participation are different—"nothing in the nature of the *Faretta* right suggests that the usual deference to 'judgment calls' on these issues by the trial judge should not obtain here as elsewhere." *Id.* Those rulings inherently abridge a *pro se* defendant's "free choice," but they only require reversal if they undermine the *Faretta* right—

and in determining whether that occurred, "the primary focus must be on whether the defendant had a fair chance to present his case in his own way." *See id.* at 177. Again, the remedy of automatic reversal is only applied if a defendant's "free choice" is wrongly constrained *and* that error undermines the fundamental fairness of the trial.

In short, when improper denial of an opportunity to make a "free choice" does not affect the fundamental fairness of the trial or the subsequent proceedings, it does not require automatic reversal.

B. The implied statutory right to waive interpreters does not impact the fundamental fairness of the proceedings. Automatic reversal is not required.

There are some constitutional dimensions to the right to interpretation services—a person who cannot understand English "can only have proper and adequate cross-examination if he is able to understand the testimony of the witnesses and is able to communicate effectively with his defense counsel." *See Thongvanh v. State*, 494 N.W.2d 679, 682 (Iowa 1993). However, there is no constitutional dimension to the implied right to *waive* interpretation services, especially if any distraction produced by the interpreter's voice can be neutralized by removing the translation earpiece. This undermines the comparison to *Faretta*, and makes that line of cases inapposite.

If the defendant had sought to assert/waive *Faretta* rights, any improper denial of that request would require automatic reversal. *See generally State v. Rater*, 568 N.W.2d 655, 661 (Iowa 1997) (observing "[h]armless error analysis is not applicable to Sixth Amendment right to self-representation questions"). But the implied statutory right to waive interpretation services has no Sixth Amendment hook—which means that he must look elsewhere to demonstrate some connection between the denial of his attempt to waive interpretation services and the fundamental fairness of ensuing proceedings in order to justify a new rule requiring automatic reversal.

But the panel's decision to require automatic reversal was "independent of concern for the objective fairness of the proceeding." *See Gomez Garcia*, at *7–8. The panel declined to determine whether the interpreter's presence had any impact on the proceedings; instead, it suggested that it would be impossible to evaluate whether/how any improper denial of attempts to waive an interpreter impacted the trial. *Id.* But the impact of this type of error may be gauged by considering the obtrusiveness of interpretation services provided, any effect they could have had on the defendant's ability to understand proceedings, and any other effect they could have had on the outcome of the trial.

To the extent that the panel opinion observes "it would be unlikely that a defendant who was erroneously denied the right to waive an interpreter could ever show the ruling impacted the ultimate outcome of the prosecution or compromised the fairness of a jury trial," that simply demonstrates how wasteful it would be to implement a rule requiring automatic reversal in these situations. *Gomez Garcia*, at *7. Indeed, mandating automatic reversal would unfairly penalize those risk-averse courts that appoint standby interpreters as a fail-safe, to guard against the distinct possibility that specialized jargon or other unfamiliar terminology will suddenly emerge halfway through trial.

> Continuous, simultaneous translation provides the most effective protection of the non-English speaking defendant's rights. Trial courts cannot be placed in an untenable position of providing reversible error no matter which way they turn.

Frescas, 636 S.W.2d at 518; *see also State v. Inich*, 173 P. 230, 234 (Mont. 1918) ("[I]t is often the case that a person who understands and speaks with reasonable ease the language of the street, or of ordinary business, encounters difficulty and embarrassment when subjected to examination as a witness during proceedings in court."). Adopting a standard that assesses standby interpreters' *actual* impact would avoid penalizing courts for taking those pragmatic precautions.

The Court of Appeals labeled the State's view of the limited prejudicial impact of standby translation "Pollyannaish." *See Gomez Garcia*, at *7. But the State does not dispute the fact that voir dire may involve *potential* jurors who harbor prejudice against defendants who need translation services—which is all that can be gleaned from the cases assembled in the panel opinion's footnote. *See id.* at *7, n.11. Each of those closed-minded jurors could be challenged for cause and excused on that basis (which happened in most of those cases). *E.g.*, *State v. Acevedo*, No. 2 CA–CR 2008–0114, 2009 WL 2357163, at *5 (Ariz. Ct. App. July 31, 2009) (finding no prejudicial error because "the trial court dismissed for cause the only two potential jurors who indicated they could not be impartial if Acevedo were in the United States illegally"); *State v. Medina*, No. 25732–1–III, 2008 WL 934075, at *9 (Wash. Ct. App. Apr. 8, 2008) ("Despite opinions they had formed, the responses given by Jurors 9 and 11 indicated they could set their preconceived ideas aside.").

The same footnote also references Judge Bennett's observations from footnote 15 in *Escobedo v. Lund*. But Judge Bennett's remarks pertain to general anti-Hispanic prejudice, and not to some unique prejudice arising out of the use of translation services. *See Escobedo*

v. Lund, 948 F.Supp.2d 951, 990 n.15 (N.D. Iowa 2013), *rev'd*, 760 F.3d 863 (8th Cir. 2014). And Judge Bennett does not recommend steering clear of interpretation services out of fear of that prejudice—instead, he demands "adequate questioning of prospective jurors" together with "further follow-up" after any biased juror is removed. *See id.* Logically, *any* voir dire would have required aggressive inquiry into any anti-Hispanic bias; the presence of an interpreter would not create any novel dangers of juror bias/prejudice unconnected to those dangers that would need to be addressed in the interpreter's absence.

Finally, the panel's citation to *Rodriguez v. State* illustrates its most critical mistake. The footnote says *Rodriguez* determined that "trial court's failure to ask about potential foreign language bias of jurors constituted error when two witnesses testified in Spanish with an interpreter." *Gomez Garcia*, at *7 n.11 (citing *Rodriguez v. State*, No. 5271999, 2001 WL 58961, at *1 (Del. Jan. 18, 2001)). However, the *Rodriguez* court affirmed the resulting conviction because that did not establish *plain error*—it was not "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process," especially when "the jurors were instructed not to be influenced by the fact that a witness testified through an interpreter."

See Rodriguez, 2001 WL 58961, at *1. Here, the trial court offered to instruct jurors that "they are to make no assumptions based on the fact that an interpreter is present in the courtroom." *See* Trial Tr. p.12,ln.9–14; Trial Tr. p.14,ln.25–p.15,ln.10. The prophylactic effect of voir dire and cautionary instructions are more than enough to guard against the possibility that an interpreter's presence could somehow undermine the fundamental fairness of the trial proceedings. No court (other than this panel of the Court of Appeals) has ever held otherwise.

Whatever message standby interpreters might send to a jury, it could not be as fraught as overt indications that a defendant presents a physical danger to people in the courtroom—and Iowa courts do not treat the use of armed guards to accompany criminal defendants as "inherently prejudicial." *See, e.g.*, *State v. Bratcher*, No. 14–2058, 2016 WL 1677997, at *4–5 (Iowa Ct. App. Apr. 27, 2016) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986)). A defendant claiming that armed guards affected the jury's decisionmaking "has the burden of showing he suffered actual prejudice," and he must overcome the presumption that jurors "follow the court's instructions" to ignore "the present situation of the defendant." *Id.* at *5. It would be absurd to view standby interpreters as *more* prejudicial than armed guards.

This argument is not "Pollyannaish"—it is grounded in reality. Every jury trial involves potential jurors who may be challenged for harboring relevant biases, and cautionary instructions that designate certain considerations as "off-limits" during deliberations. Even so, we trust jurors when they swear an oath to set aside biases and follow the court's instructions. *See, e.g.*, *State v. Owens*, 635 N.W.2d 478, 483 (Iowa 2001); *State v. Brown*, 397 N.W.2d 689, 697 (Iowa 1986). If that were not the case, no defendant who needed an interpreter could ever receive a fair jury trial in the State of Iowa. The defendant cannot be allowed to invalidate an otherwise fair trial proceeding by casting baseless aspersions on Iowa jurors' capacity to try him fairly—he must be required to *show* unfairness to overturn his conviction. Automatic reversal cannot be the correct remedy for this type of error, and the Court of Appeals erred when it held otherwise.

CONCLUSION

The defendant has been tried and found guilty. On appeal, he does not allege the trial was unfair in any way. There is no reason to vacate this conviction, and no reason to require automatic reversal in this case (or in future cases involving similar claims).

The State respectfully requests this Court reverse the decision of the Court of Appeals and affirm the defendant's conviction.

REQUEST FOR ORAL ARGUMENT

The State believes oral argument is likely to assist this Court in determining whether this type of error requires automatic reversal.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@iowa.gov

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g) and 6.1103(4) because:

    - This brief contains **3,945** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

    - This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Georgia font, size 14.

Dated: November 29, 2016

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@iowa.gov